

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ELLENSBURG
CEMENT PRODUCTS,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB Nos. 87-250 & 88-89

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal from Department of Ecology Notice and Order No. DE 87-C411, and appeal from Department of Ecology Notice of Penalty Incurred and Due No. DE 87-C412 in the amount of \$3,000, came on for hearing before the Pollution Control Hearings Board, Wick Dufford, Presiding, and Hal Zimmerman, at a formal hearing in Ellensburg, Washington, on July 14, 1988.

Appellant appeared by his attorney John P. Gilreath. Respondent appeared by Jeffrey S. Myers, Assistant Attorney General.

Court reporter Pamela J. Brophy of Gene Barker & Associates, Olympia, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and examined, the Board makes these

FINDINGS OF FACT

I

Appellant Ellensburg Cement Products, Inc. owns and operates a cement batch plant located alongside Mercer Creek near Wenas Street and 7th and Highway 12 in Ellensburg.

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II

Respondent Department of Ecology (DOE) is a state agency charged with administration and enforcement of the State's Water Pollution Control Law, Chapter 90.48 RCW.

III

On October 8, 1967, Ecology inspectors Harold Porath and John Hodgson visited the batch plant. The inspectors observed a cement truck being washed on a cement pad approximately 50 yards from Mercer Creek. The wash water collected into a drain on the pad and flowed through an underground pipe to the adjacent creek. At this point the wash water, which contained cement, discharged into Mercer Creek creating a turbid grey-colored plume.

IV

Upstream of the discharge pipe, the creek water was clear. The inspectors observed the plume flowing downstream for approximately 45 yards, where it flowed into a culvert crossing a local road. The stream remained cloudy for as far as they could see.

The Board takes notice of the fact that the addition of five nephelometric turbidity units (NTU) to clear water is difficult to discern with the naked eye. Here the turbidity plume was distinct, obvious, easily visible. The clear appearance of the water upstream is indicative of background turbidity well below 50 NTU. Under the circumstances, the observance of a marked, discernible turbidity plume demonstrates a change of greater than five NTU over background.

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V

The inspectors observed a significant quantity of dried cement on the banks of Mercer Creek. They saw piles of concrete where cement had been disposed of. The inspectors took photographs of what they observed at the creek and grounds.

After making their observations, the inspectors met with James Hutchinson, president of Ellensburg Cement Products, at the batch plant offices. Hutchinson admitted that the discharge to the creek was from the company's truck washing operations. He confirmed that the drain and discharge pipe arrangement had been in place for a considerable time. After brief discussion, he agreed that the discharge would be eliminated.

VI

Mercer Creek is a natural watercourse which rises in the Colockum Hills and flows into the valley through Ellensburg. On part of its journey through the city it is undergrounded. At the batch plant site it is an uncovered, open, free-flowing stream, varying between 8 and 15 feet wide and from 6 inches to 1 1/2 feet deep. Below the site it joins Wilson Creek, a natural stream which receives irrigation return flows. Ultimately (four to five miles below the batch plant), the combined creeks flow into the Yakima River.

At the time of Ecology's inspection, Ellensburg Cement Products

1 had no waste discharge permit for discharges to Mercer Creek from its
2 batch plant site, nor had it applied for one.

3 VII

4 On October 23, 1987, Ecology issued two orders to Ellensburg
5 Cement Products. The first, Order No. DE 87-C411, was a regulatory
6 directive, reciting the observations of October 8, 1987, and
7 specifying corrective actions to be taken. The order called for an
8 immediate cessation of wash water discharges to the creek and for
9 retaining a professional engineer within 15 days of receiving the
10 order to prepare plans and specifications for control, prevention or
11 elimination of waste water discharges. The plans and specifications
12 were to be submitted to Ecology in 60 days, with construction to
13 follow Ecology's approval on a schedule to be established.

14 The second order, Order No. DE 87-C412, was a notice of civil
15 penalty, based on a recitation of the inspector's observations
16 identical to that contained in the first order. The penalty assessed
17 was \$3,000.

18 VIII

19 Ellensburg Cement Products attempted to effect an interim
20 correction of its disposal practices. In late October, 1987, an 8 to
21 10 foot deep unlined pit was dug and washwater discharges were
22 rerouted to this pit where they co-mingled with the ground water. The
23 pit was inspected by Harold Porath on October 29, 1987, but, in his
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1 view, it fell far short of fulfilling the requirements of Ecology's
2 regulatory directive.

3 IX

4 On November 9, 1987, the Pollution Control Hearings Board
5 received an appeal from Ellensburg Cement Products of Ecology's
6 regulatory directive (Order No. DE 87-C411). Concurrently with this
7 appeal, the company filed a request with Ecology to exercise its
8 discretion and reduce or eliminate the monetary penalty.

9 On November 24, 1987, after Ecology notified the company of its
10 refusal to alter the penalty, Ellensburg Cement Products sent a notice
11 of appeal of the penalty to both Ecology and the Board. Ecology
12 received its copy of the appeal on November 30, 1987. The Board did
13 not receive its copy.

14 Months later, after being informed that the Board had not
15 received the appeal of the penalty, Ellensburg Cement Products filed
16 another copy thereof with the Board. The two cases, PCHB Nos. 87-250
17 (regulatory directive) and PCHB 88-89 (penalty), relating to the same
18 underlying facts, were then consolidated for hearing by the Board.

19 X

20 On March 11, 1988, Ellensburg Cement Products sent a draft
21 engineering report to Ecology. This report was finalized April 8,
22 1988, and approved on April 13. On June 8, 1988, Ellensburg Cement
23 Products notified DCE that the engineered facilities had been
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1 constructed. On June 27, 1988, Ecology issued an order (Order No. DE
2 88-369) acknowledging that the deficiencies identified in the
3 regulatory directive had been corrected.

4 XI

5 On two earlier occasions, one in 1976 and the other in 1985, the
6 company was cited by Ecology for discharging turbid water. These
7 incidents arose from gravel mining operations at sites other than the
8 Ellensburg batch plant. In each case, penalties were assessed by
9 Ecology (\$500 and \$1,000 respectively) and paid by the company.

10 XII

11 Any Conclusion of Law which is deemed to be a Finding of Fact is
12 hereby adopted as such. From these Findings of Fact, the Board comes
13 to these

14 CONCLUSIONS OF LAW

15 I

16 The Board has jurisdiction over these matters and these parties.
17 Chapter 90.48 RCW, Chapter 43.21B RCW.

18 II

19 RCW 43.21E.300 and 310 provide for the appeal to the Board of
20 penalties and orders issued by Ecology. Appeals must be filed within
21 30 days after receipt of the penalty or order.

22 Prior to the hearing, Ecology moved to dismiss the civil penalty
23 appeal on the grounds that it was not timely filed with the Board.
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1 After briefing and argument, the Board denied the motion.

2 The regulatory directive issued in this case is an order issued
3 pursuant to RCW 90.48.120(2), appealable to the Board by the express
4 terms to RCW 43.21B.310(1). That the appeal of this directive was
5 properly and timely made to the Board is not contested.

6 Once the regulatory directive was appealed, the Board acquired
7 jurisdiction and the underlying facts were placed at issue.
8 Thereafter, the function of pleadings, as to the events, was simply
9 for notice purposes. The notice function is adequately performed if
10 parties are advised of the issues sufficiently in advance of hearing
11 that undue surprise and prejudice do not result. Marysville v.
12 PSAPCA, 104 Wn.2d 115, 119, 702 P.2d 469 (1985).

13 Here Ecology was timely advised of the civil penalty appeal.
14 When this appeal was received, Ecology had already been informed of a
15 challenge to the facts giving rise to its regulatory actions. Under
16 the circumstances, we do not view the problems with the mails in
17 lodging the second appeal document with the Board as fatal. We
18 interpret the civil penalty appeal as a proper amendment to the
19 pleadings previously made regarding the regulatory directive. No
20 surprise or prejudice was shown. See R. V. Associates v. PSAPCA, PCHE
21 No. 88-28 (Order on Motion to Dismiss, July 13, 1988).

22 III

23 Ecology also moved to dismiss the appeal of the regulatory
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1 directive on the grounds that because the alleged deficiencies had been
2 corrected prior to hearing, the matter was moot. We denied this
3 motion as well.

4 While Ellensburg Cement Products was implementing the
5 recommendations of its engineer concerning waste water disposal, it
6 did not abandon its appeal of the facts which gave rise to the
7 regulatory directive. While pursuing a course of action on the
8 ground, it preserved its legal right to challenge the facts asserted
9 to constitute a violation of the law. The appropriateness of the
10 regulatory directive was not moot.

11 IV

12 "Waters of the State", as defined by RCW 90.48.020 shall be
13 construed to include "lakes, rivers, ponds, streams, inland waters,
14 underground waters, salt waters, and all other surface waters, and
15 water courses, within the jurisdiction of the State of Washington."
16 (Emphasis added.)

17 We conclude that Ellensburg Cement Products' discharge of wash
18 water was to waters of the state.

19 V

20 Ecology's theory in prosecuting the regulatory actions at hearing
21 was that the directive and penalty are supported because appellant's
22 actions constituted a violation of RCW 90.48.080 and RCW 90.48.160.
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1 RCW 90.48.080 states:

2 It shall be unlawful for any person to throw,
3 drain, run, or otherwise discharge into any of
4 the waters of this state, or to cause, permit or
5 suffer to be thrown, drained, allowed to seep or
6 otherwise discharged into such waters any
7 organic or inorganic matter that shall cause or
8 tend to cause pollution of such waters according
9 to the determination of the [DOE], as provided
10 in this chapter. (Emphasis added.)

11 "Pollution" is defined in RCW 90.48.020 to include alteration of
12 waters of the state in such a way as "is likely to create a nuisance
13 or render such wastes harmful" in some way. Thus, the word is
14 described in terms of the detrimental potential of discharges. It is
15 not necessary that harm itself be shown in any case. Lundvall v. DOE,
16 PCHB No. 86-91 (1987).

17 VI

18 As to some man-induced alterations to water quality, Ecology has
19 expressed its determination of what constitutes pollution in
20 legislatively-adopted rules setting forth water quality standards.
21 See RCW 90.48.035, Centralia v. Department of Ecology, PCHB No. 84-287
22 (1985).

23 The water quality standard for turbidity appears in WAC
24 173-201-045(2)(v1) which reads:

25 Turbidity shall not exceed 5 NTU over background
26 turbidity when the background is 50 NTU or less,
27 or have more than a ten percent increase in
aturbidity when the background turbidity is more
than 50 NTU.

1 That exceeding this standard "is likely to create a nuisance or
2 render such waters harmful" is a legislative fact embodied in the
3 agency's rulemaking and not at issue here.

4 VII

5 We conclude that the discharges from Ellensburg Cement Products
6 observed On October 8, 1987, violated the relevant water quality
7 standard and, therefore, caused pollution in violation of RCW
8 90.48.080.

9 However, even were there no violation of a relevant standard, it
10 would be enough to show that appellants introduced material into
11 public waters which might "tend to cause" this result. Pollution is
12 frequently the result of many discharges from multiple sources, no
13 one being harmful alone, but all combining to produce a harmful
14 consequence. Thus, the regulatory scheme of the water quality
15 statute as a whole is to authorize the limitation of discharges at
16 levels which can be achieved by known, available and reasonable
17 technology. See e.g., RCW 90.48.010, 90.52.040, 90.54.020(3)(b).

18 What technology can reasonably achieve for a single source is
19 frequently a discharge much cleaner than the level of contamination
20 of public waters which constitutes pollution. It is the ability to
21 control individual discharges at these lower levels of contamination
22 which makes the introduction of new industry possible within the
23 overall standards set for the receiving medium. See Weyerhaeuser v.
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1 Southwest Air Pollution Control Authority, 91 Wn.2d 77, 586 P.2d 1163
2 (1978).

3 VIII

4 The heart of the regulatory apparatus for limiting discharges by
5 use of technology-based requirements, is the waste discharge permit
6 system. RCW 90.48.160 imposes a requirement that

7 Any person who conducts a commercial or industrial
8 operation of any type which results in the
9 disposal of solid or liquid waste material into
the waters of the state ... shall procure a permit
... before disposing of such waste material...

10 Through RCW 90.48.260 and 262, the state permit program incorporates
11 the federal permit requirements for National Pollutant Discharge
12 Elimination System (NPDES). The technology-based limitations are
13 imposed through conditions "necessary to avoid ... pollution" in the
14 permits issued by the state. RCW 90.46.180; See Port Angeles V. DOE,
15 PCHE 84-178 (1985).

16 IX

17 Appellant company contends that the discharge of wash water
18 containing cement is not the discharge of wastes and that, therefore,
19 the permit requirement does not apply to it.

20 The term "waste material" is not defined in the statute. In the
21 absence of statutory definition, the plain meaning is to be used.
22 Webster's New World Dictionary (1968) defines "waste" as "superfluous
23 matter, discarded or excess material, as ashes, garbage, by products."
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We conclude that the addition of cement to the wash water constitutes the disposal of "waste material" as that term is used in RCW 90.48.160, and we hold that the discharges from Ellensburg Cement Products observed on October 8, 1987, violated the permit requirement established in RCW 90.48.160.

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RCW 90.48.120 provides for the issuance of regulatory directives "as appropriate under the circumstances" whenever any person

Shall violate or creates a substantial potential to violate the provisions of this chapter, or fails to control the polluting content of waste discharged

In light of the violations of RCW 90.48.080 and RCW 90.48.160 involved here, we conclude that the regulatory order (Order DE 87-C411) issued was proper.

XI

RCW 90.48.144 authorizes the issuance of a penalty for the violation of RCW 90.48.080 or RCW 90.48.160 of "up to ten thousand dollars a day for every such violation". The statutory ceiling on this penalty was raised as recently as 1985, reflecting a legislative intention to treat actions contravening the water pollution control statute with increased seriousness. Section 2, Chapter 316, Laws of 1985.

Again in light of the violations of the statute here, we conclude that the imposition of a civil penalty was proper.

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XII

This leaves the question of whether the amount of penalty assessed -- \$3,000 -- is appropriate. Appellant notes that no harm was shown and that the discharge has been discontinued. Ecology emphasizes the company's prior turbidity problems and its slowness in obtaining the required engineered solution to the problem at hand.

Because of the incidents in 1976 and 1985 (for which it paid penalties), the company knew or should have known that the creation of turbidity in state waters is a violation of water pollution control requirements. Since the prior incidents involved mud and silt, it should have come as no surprise that producing the same effect by adding cement to water would also be considered a violation. Under these circumstances, it is surprising that the installation at the Ellensburg batch plant in 1987 should contain a permanent pad, drain and pipe system for the discharge of cement-laden wastewater directly to the creek.

Under all the facts and circumstances, we conclude that the less-than-maximum penalty imposed was not unreasonable.

XIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

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ORDER

The Department of Ecology's regulatory directive (Order No. DE 87-411) and the Department of Ecology Notice of Penalty Incurred and Due (No. DE 87-C412) assessing a penalty of \$3,000 are each AFFIRMED.

DONE this 17th day of January, 1989.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Presiding

Harold S. Zimmerman

HAROLD S. ZIMMERMAN, Member

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